HON'BLE SHRI G.S.SINGHVI, THE CHIEF JUSTICE
AND
HON'BLE SHRI JUSTICE C.V. NAGARJUNA REDDY

WRIT APPEAL No. 92 OF 2007

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Between:

M/s. Sri Harsha Constructions,
Rep. by its Managing Partner,
Hyderabad

.... Appellant

AND

The Principal Secretary,
Roads and Buildings Department,
Hyderabad & others

.....Respondents

:: J U D G M E N T ::

Counsel for the appellant : Shri Prasada Rao Vemulapalli

Dated: 31.01.2007

Per G.S.SINGHVI, CJ

This is an appeal for setting aside order dated 25-7-2006 passed by the learned Single Judge in Writ Petition

No.22894 of 2004, whereby she refused to nullify the decision of the official respondents to terminate the contract awarded to the appellant for construction of high level bridge across river Pennar at Siddautham, Kadapa District and to forfeit the bank guarantee furnished for successful execution of the contract.

The facts:

In pursuance of the tender notice issued by Superintending Engineer (R&B), Kadapa (respondent No.3), the appellant gave bid for construction of high level bridge across river Pennar at K.M.No.5/0-10 of Bakrapet at Siddautam road. The bid of the appellant was accepted and the work was awarded to it. For this purpose, the parties entered into an agreement dated 15.05.2004. One of the unsuccessful bidders filed Writ Petition No.9113 of 2004 questioning the award of contract to the appellant. By an interim order dated 01.06.2004, this Court directed that the contract awarded to the successful bidder (the appellant herein) shall be subject to further orders. After hearing the parties, the learned Single Judge allowed the writ petition on 05.11.2004 and quashed the contract awarded to the appellant.

In the meanwhile, Executive Engineer (R&B) Division, Kadapa issued proceedings dated 23.09.2004, whereby he terminated the contract awarded to the appellant and encashed the bank guarantees furnished by it. This was done on the ground that the appellant had failed to execute the contract in terms of agreement dated 15.05.2004.

The appellant challenged the termination of the agreement by contending that the action of respondent

No.4 is wholly arbitrary and unjust and that the encashment of bank guarantees was totally unwarranted.

In the counter filed on behalf of respondent Nos.1 to 4, Shri M.V.R. Vivekananda Reddy, Executive Engineer, R&B Division, Kadapa averred that the agreement was terminated because the writ petitioner did not evince any interest to start the work and this continued to be the position despite repeated communications and notices. According to Shri M.V.R. Vivekananda Reddy, the bank guarantees were encashed in terms of Clause 60(a) of P.S. to A.P. Standard Specifications.

The learned Single Judge dismissed the writ petition by observing that the petitioner has not questioned the termination of the agreement and the bank guarantees had been encashed in accordance with the terms and conditions of agreement. In the opinion of the learned Single Judge, the encashment of bank guarantees cannot be termed as illegal or vitiated by fraud.

Shri Prasada Rao Vemulapalli, learned counsel for the appellant vehemently argued that the reasons assigned by the learned Single Judge for refusing to nullify the cancellation of agreement dated 15.05.2004 and encashment of the bank guarantees are legally untenable and the order under challenge is liable to be set aside. Learned counsel invited our attention to the prayer clause of the writ petition to show that the appellant had specifically prayed for quashing of the action of respondent No.4 to terminate the agreement and encash the bank guarantee and argued that the learned Single Judge could not have non-suited the

appellant by wrongly assuming that there was no challenge to the termination of the agreement. Shri Rao emphasized that the contract, which was subject matter of challenge in Writ Petition No.9113 of 2004, was the one which was cancelled on 23.09.2004 and argued that the learned Single Judge gravely erred by observing that the two writ petitions related to different contracts. Learned counsel then argued that in view of order dated 05.11.2004 passed in Writ Petition No.9113 of 2004, whereby the contract awarded to the appellant was nullified, the respondents are duty bound to return the bank guarantees furnished for successful execution of the contract.

In our opinion, there is no merit in the arguments of the learned counsel and the appeal is liable to be dismissed. It is true that while dismissing the writ petition filed by the appellant, the learned Single Judge erroneously assumed that there was no challenge to the cancellation of the agreement and that the contract awarded to the appellant for construction of high level bridge across river Pennar at Siddautham at K.M.No.5/0-10 of Bakrapet, Siddautham road was not subject matter of Writ Petition No.9113 of 2004, but, in our considered view, these errors are not sufficient for granting relief to the appellant.

A perusal of proceedings dated 23.09.2004 issued by respondent No.4 shows that the contract awarded to the appellant was cancelled after issuing notices dated 17.07.2004, 12.08.2004, 19.08.2004 and 01.09.2004 and sending various communications for commencement of the work. On each occasion, the appellant came forward with some or other excuse for not starting the work.

This left the officer concerned i.e. respondent No.4 with no option but to cancel the work. All this is evinced from the following extracts of proceedings dated 23.09.2004:

> "The work of "Construction of High Level Bridge across river Pennar at Sidhoutam at Km,5,0-10 of Bhakrapet-Sidhoutam road in Cuddapah District" has been awarded to you vide CR AGT NO 11/2004-05. The site for the above work has been handed over to you on 15-05-04 with a stipulation to complete the work within 18 months. But even though more than 4 months were lapsed, you have failed to start the work and prolonging the issue months together with unnecessary correspondence which results in wastage of time. Even though you were given ample of opportunity to start the work, all are in vain, In your letter Dt:08-09-2004 (Ref 15th cited) you have stated that you are commencing the work on 20-09-2004 and the Bhoomi Puja will be going to be celebrated on 21-09-2004, You have not stood by your statement and failed to start the work, The Deputy Executive Engineer (R&B)Badvel also reported that there are no signs of commencement of work in the site (Ref 17th cited).
>
> Hence, in view of the above position and all the efforts taken to start the work are in vain, the department has no other option except termination of the contract under CR AGT NO 11/04-05.
>
> Hence, the work of "Construction H.L.B. across river Pennar at Sidhoutam at Km.5/10 of Bhakrapet Sidhoutam road in Cuddapa District" awarded to you vide CR AGREEMENT NO 11/04-05 is hereby terminated under clause 60(a) to A.P.S.S. read with clause 26(2) duly forfeiting all your assets with the department under the above contract."

In the affidavit filed by him, Shri N. Venkateswara

Rao, Managing Partner of the appellant did not dispute the receipt of communications and notices sent by respondent No.4. Not only this, he did not offer any tangible explanation for not commencing the work for construction of the bridge. Therefore, the ultimate decision taken by respondent No.4 to cancel the contract cannot be termed as arbitrary or unreasonable warranting judicial intervention.

The appellant's plea that it could not commence the work on account of pendency of Writ Petition No.9113 of 2004, which was ultimately allowed on 05.11.2004, is without substance. It is neither the pleaded case of the appellant nor any material has been placed before the Court to show that execution of the contract awarded to it had been stayed in the proceedings of Writ Petition No.9113 of 2004. Therefore, there was no justification on the appellant's part not to start the construction activity in accordance with agreement dated 15.05.2004. The order passed by the learned Single Judge in Writ Petition No.9113 of 2004 cannot be made basis for nullifying the decision of respondent No.4 to cancel the contract vide proceedings dated 23.09.2004 because the same was not subject to the adjudication of that petition.

Insofar as encashment of bank guarantees furnished by the appellant is concerned, we are in complete agreement with the learned Single Judge that the judicial interdiction in such matters is not called for. In **Ansal Engineering Projects Limited v. Tehri Hydro Development Corpn. Ltd.**[1], the Supreme Court considered this issue and held:

> "In terms of the bank guarantee the beneficiary is entitled to invoke the bank

guarantee and seek encashment of the amount specified in the bank guarantee. It does not depend upon the result of the decision in the dispute between the parties, in case of the breach. Bank guarantee is an independent and distinct contract between the bank and the beneficiary and is not qualified by the underlying transaction and the validity of the primary contract between the person at whose instance the bank guarantee was given and the beneficiary. The underlying object is that an irrevocable commitment either in the form of bank guarantee or letters of credit solemnly given by the bank must be honoured. The Court exercising its power cannot interfere with enforcement of bank guarantee/letters of credit except only in cases where fraud or special equity is prima facie made out in the case as triable issue by strong evidence so as to prevent irretrievable injustice to the parties. Otherwise the beneficiary cannot be restrained from encashing the bank guarantee even if dispute between the beneficiary and the person at whose instance the bank guarantee was given by the bank, had arisen in performance of the contract or execution of the works undertaken in furtherance thereof. The trading operation would not be jettisoned and faith of the people in the efficacy of banking transactions would not be eroded or brought to disbelief. The question, therefore, is whether the petitioner had made out any case of irreparable injury by proof of special equity or fraud so as to invoke the jurisdiction of the Court by way of injunction to restrain the respondent from encashing the bank guarantee."

The same view has been reiterated in **U.P. State Sugar Corpn. v. Sumac International Ltd.**[2],

Dwarikesh Sugar Industries Ltd. v. Prem Heavy Engineering Works (P) Ltd.[3], **Federal Bank Ltd. v. V.M. Jog Engg.Ltd.**[4], **Oil & Natural Gas Corpn.Ltd. v. SBI, Overseas Branch**[5] and **BSES Ltd. v. Fenner India Ltd.**[6]

By applying the propositions laid down in the aforementioned decisions, we hold that the encashment of bank guarantees furnished by the appellant does not suffer from any legal infirmity.

In the result, the appeal is dismissed.

G.S.SINGHVI, CJ

C.V. NAGARJUNA REDDY, J

31.01.2007

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[1] (1996) 5 SCC 450
[2] (1997) 1 SCC 568
[3] (1997) 6 SCC450
[4] (2001) 1 SCC 663
[5] (2000) 6 SCC 385
[6] (2006) 2 SCC 728